SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 175

BILTMORE HOMES, INC., AND FRANK B. COOPER, CHARLES F. COOPER, JAMES D. COOPER,
PETITIONERS,

versus

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1961

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BILTMORE HOMES, INC., AND FRANK B. COOPER, CHARLES F. COOPER, JAMES D. COOPER,
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COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Biltmore Homes, Inc., and Frank B. Cooper, Charles F. Cooper and James D. Cooper respectfully pray for a writ of *certiorari* to the United States Court of Appeals for the Fourth Circuit to review, in part, the judgment of that Court entered March 27, 1961 affirming decisions of the Tax Court of the United States relating to the Petitioners herein.

OPINIONS BELOW

The findings of fact and opinion of the Tax Court in these consolidated cases are set forth in the record. (R. 43-71.) [1]

The decisions of the Tax Court were affirmed by the Fourth Circuit on March 27, 1961, not yet officially reported. A copy of the opinion appears as Appendix "A" to this Petition.

JURISDICTION

These proceedings were brought in the Tax Court of the United States under the provisions of Section 6213 of the Internal Revenue Code of 1954. (26 USCA Section 6213.)

The jurisdiction of this Court is invoked under the provisions of Section 7482 of the Internal Revenue Code of 1954 (26 USCA Section 7482), and 28 USCA Section 1254.

QUESTION PRESENTED

Where the individual Petitioners were the only stockholders of the Petitioner, Biltmore Homes, Inc., a taxable corporation, and were also officers in control of two tax-exempt Building and Loan Associations, to wit: Perpetual Building & Loan Association and Mutual Savings & Loan Company, did the Court of Appeals and the Tax Court err in disregarding the separate entities of these corporations and in holding that a certain profit earned by Mutual was legally taxable income of Biltmore and its stockholders?

STATUTES INVOLVED

The statutory provisions involved are sections 22(a) and 115 of the Internal Revenue Code of 1939. These provisions are set forth in Appendix "B" to this Petition.

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[1] References are to the appendix to the taxpayers' brief and will be cited as "R".

STATEMENT

Petitioner submits that all material facts here involved are undisputed.

The facts as stipulated and as found by the Tax Court and confirmed by the Court of Appeals, insofar as they relate to the issue here presented, may be summarized as follows:

Biltmore Homes, Inc. was organized in 1946 under South Carolina law with capital stock of $5,000.00 owned equally by the three Cooper brothers who are the individual petitioners in this case. (R. 45; App. 2.)

At times here pertinent, these three brothers were controlling officers of two tax-exempt building and loan associations, namely, Mutual Savings and Loan Company, organized in 1900, hereinafter called Mutual, and Perpetual Building and Loan Association, organized in 1914, hereinafter called Perpetual. (R. 46-40; App. 2-3.)

On March 15, 1947, one Simon Faust, an independent building contractor, made a written agreement with Biltmore to build a certain ninety FHA approved houses on ninety lots owned by Biltmore near Columbia, South Carolina for $5,100.00 each payable upon completion. (R. 47; App. 3.)

In order to pay Faust the agreed sum of $5,100.00 per house upon completion, Biltmore gave to Perpetual, an FHA approved mortgagee, a note and mortgage on FHA forms on each of its ninety lots and improvements thereon so that FHA mortgage insurance could be obtained upon completion of the houses with final FHA approval, and Biltmore assigned irrevocably, to or for the account of Faust, the sum of $5,100.00 of the proceeds of each of these ninety FHA-insured loans, to be disbursed by Perpetual, the FHA approved mortgagee, only after the houses were completed and the mortgages were insured by FHA. Bilt-

more did not agree to make any advances to Faust during the construction of the houses. (R. 47-48; App. 3-4.)

On April 1, 1947, Faust made a written agreement with Mutual to build these same ninety houses, for the account of Mutual, for $4,000.00 each, and Mutual agreed to advance to Faust the entire $360,000.00 during construction of the houses. (R. 48-49; App. 4-5.)

Thereafter, in 1947, Mutual advanced to Faust the sum of $360,000.00 during construction; Faust completed the ninety houses as agreed; FHA insured the ninety Biltmore mortgages for Perpetual, the mortgagee; and Perpetual held or disbursed for the account of Mutual, as assignee of Faust, the sum of $5,100.00 of the proceeds of each of these ninety FHA-insured loans, all as agreed. (R. 49-50; App. 5-6.)

Based upon the close relationship of the taxpayers and the tax-exempt associations, the Commissioner held that the profit of $99,000.00 earned by Mutual under its contract with Faust was legally taxable income of Biltmore and its stockholders. (R. 38.) He assessed corporate taxes against Biltmore on income of $99,000.00 and personal taxes against each of its three stockholders on income of $33,000.00 as dividends constructively received from Biltmore. These assessments, with minor adjustments, were upheld by the Tax Court and the Court of Appeals.

REASONS FOR GRANTING THE WRIT

The decision is in conflict with the basic concept of Income Tax law, as exemplified by the decision of the Ninth Circuit in *Twin Oaks Co. v. Commissioners of Internal Revenue*, 183 Fed. (2d) 385 that income must be taxed to those who earn and are entitled to receive it.

It is also in conflict with the decision of the Sixth Circuit in *Tennessee-Arkansas Gravel Co. v. Commissioner*,

112 Fed. (2d) 508 and other similar cases, which hold that Section 22(a) of the Internal Revenue Code of 1939 does not authorize the Commissioner to set up income where none exists.

The basic error of the Fourth Circuit, in its opinion in the instant case, stems from its misconception of the legal issue presented in this case which is that income is legally taxable to the who earns it. Earnings of one are not legally taxable to another regardless of their close relationship. The incidence of income taxation is not determined by who receives the income but by who earns and is legally entitled to receive it. The opinion of the Circuit Court clearly shows that its decision is based upon its conclusion as to who received the profit.

Both the Tax Court and the Circuit Court, in their opinions, criticized the individual Petitioners (the stockholders) for not testifying in detail as to who received the profit upon the disbursement of the FHA loan proceeds by Perpetual, which was a matter not only immaterial to the issue as to who earned the profit and was legally entitled to receive it, but was also a matter which was not materially in dispute. The Commissioner found that the profit was received by one or both of the tax-exempt Building & Loan Associatons and the Petitioners admitted that it was received by Mutual, which earned and was legally entitled to receive it. Under the contract between Biltmore and Faust, Faust or his assignee was legally entitled to receive it and under the contract between Mutual and Faust the profit was transferred and assigned to Mutual. The undisputed facts, as stated by the Circuit Court and the Tax Court show that Mutual made and performed the contract with an independent contractor from which the profit was derived and therefore it earned, and was legally entitled to receive the income involved in this case. The con-

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tract above mentioned and the facts found by the Tax Court and Court of Appeals show that Perpetual, a Building and Loan Association supervised by the Board of Bank Control of the State of South Carolina, was legally required to disburse the sum of $5,100.00 of the proceeds of each of the ninety FHA insured loans to Mutual as the Assignee of Faust and it is immaterial whether it did so or retained the proceeds for its own use and benefit. The fact is that neither Biltmore nor its stockholders ever received it and were certainly not benefitted by the retention of the funds by Perpetual, or the payment of the same to Mutual, to any greater extent than the other numerous shareholders of Perpetual and/or Mutual.

CONCLUSION

For the reasons given *certiorari* should be granted.

Respectfuly submitted,

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June 22, 1961.

APPENDIX A

Opinion of the United States Court of Appeals for the Fourth Circuit.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 8246

Biltmore Homes, Inc., Charles F. Cooper, Charles F. Cooper and Virginia P. Cooper, Frank B. Cooper, Frank B. Cooper and Jean R. Cooper, James Cooper and Betty D. Cooper, and James Cooper,
Petitioners,
versus
Commissioner of Internal Revenue,
Respondent

ON PETITIONS TO REVIEW THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

(Argued January 18, 1961. Decided March 27, 1961.)

Before SOPER, HAYNSWORTH and BOREMAN, Circuit Judges.

Charles F. Cooper and E. W. Mullins (Nelson, Mullins & Grier on brief) for Petitioners, and James P. Turner, Attorney, Department of Justice, (Charles K. Rice, Assistant Attorney General, and Lee A. Jackson and A. F. Prescott, Attorneys, Department of Justice, on brief) for Respondent.

SOPER, Circuit Judge:

The principal question with which we are concerned in these consolidated cases grows out of the activities of three brothers residing in Columbia, South Carolina, in connection with a local housing development under the Fed-

eral Housing Administration. The three men, Frank B. Cooper, Charles F. Cooper, and James D. Cooper, formed the Biltmore Homes, Inc. under the laws of South Carolina on September 17, 1946. The capital stock of the corporation, consisting of 5,000 shares with a par value of $1.00 per share, was subscribed and paid for in equal shares by the three men. The officers of the corporation from its inception to its dissolution on September 1, 1948, were Frank, its president, and James, its vice president, secretary and treasurer. Frank was in charge of the operations of the corporation.

In 1946, Biltmore acquired several tracts of real estate including lots in a subdivision called "Oakhurst" for which it paid $48,950.00. During the taxable period it made use of this property in a building operation under the Federal Housing Administration.

The three brothers were also actively engaged in a number of other business enterprises for profit, either singly or together, most of which were incorporated. Of especial importance in connection with the Biltmore housing operation were two corporations in the finance and mortgage field, to wit: Perpetual Building and Loan Association of Columbia and the Mutual Savings and Loan Company. Both corporations were organized under the laws of South Carolina. The officers of Perpetual were Charles, president; Frank, vice president; and James, treasurer. Charles was in charge of the operations of Perpetual. He is a lawyer and he appeared for the taxpayers in these cases in the Tax Court and also in this court. James was the president of Mutual and was in charge of its operations. His brothers were shareholders in the corporation. Both Perpetual and Mutual had been held to be exempt from federal income taxes during the taxable years by rulings under the provisions of §101(4) of the Internal Revenue Code of 1939. Because of this fact the brothers conceived the idea that it would be desirable to conduct the Biltmore housing operations in such manner that the profits would find their way into the hands of Perpetual or Mutual or both, and it is their contention in this litigation that they were successful in this endeavor. With

this end in view they caused the three corporations—Biltmore, Perpetual and Mutual—to engage in the following transactions.

On March 15, 1947, Biltmore, acting through Frank, its president, entered into an agreement with one Simon Faust, a building contractor, for the construction of ninety-four houses (with extras) on the Oakhurst tract for $5,100.00 per house. This agreement, together with an estimate of the cost of each house in the sum of $5,352.25 (including landscaping, water connections, FHA fees, insurance, sales expenses and so forth) and the cost of each lot in the sum of $900.00, or an aggregate cost of $6,252.25 for Administration in order to obtain an insured mortgage for each house and lot, were filed with the Federal Housing 90 per cent of the estimated cost of the project.

In order to pay Faust the agreed sum of $5,100.00 per house, the agreement provided that Biltmore should give to Perpetual, of which Charles was president, a note and mortgage on FHA forms on each of the lots and the improvements thereon so that FHA insurance could be obtained. Biltmore also agreed to assign irrevocably the proceeds of the loan for the account of Faust to the extent of $5,100.00 per house. It was, however, expressly provided that Faust should be paid nothing until completion and until after the mortgage in each case had been insured by FHA and all the moneys due by Faust for labor and materials and construction had been paid. James, the president of Mutual, assisted his brother Frank in these transactions with Faust.

It clearly appears from closely following events that the estimate of the cost of the houses filed by Biltmore and Faust was excessive and that Faust was entirely willing to build the houses for much less than $5,100.00 per house. It was also clear that the brothers had no difficulty in arranging to finance the building operation during the period of construction. On April 1, 1947, only seventeen days after Faust agreed with Biltmore to build the houses for $5,100.00 each, he entered into an agreement with Mutual to build the same houses for $4,000.00 each. This agreement was signed on behalf of Mutual by James, its president. It pro-

vided that Faust might obtain construction money by giving his note for 376,000.00 ($4,000.00 per house) * secured by a mortgage on the improvements to be erected and on the supplies placed on Oakhurst and other properties of Biltmore and of Faust and by all amounts due to Faust under the contract. The balance due by Faust at any time was to be all the amounts furnished by Mutual, Biltmore or Perpetual. The last two corporations did not agree to make advances to Faust during the construction of the buildings but the mention of them in this connection in the agreement gives evidence of the close relationship between them in carrying out the building operation.

On April 10, 1947, ten days after the agreement between Faust and Mutual was signed, Biltmore, in accordance with its agreement with Faust, executed and delivered to Perpetual ninety first mortgages on ninety lots and the improvements to be later erected thereon in Oakhurst in the aggregate sum of $472,900.00. Therein it was agreed that Biltmore was to receive the difference between $5,100.00 per house to be paid to Faust and the face amount of the first mortgage on each lot and that Perpetual would finance the sales of the properties to veterans and that the veterans would assume the first mortgage and execute second mortgages for the 10 per cent down-payment plus the closing costs and so forth.

Faust built ninety houses on the Oakhurst tract in 1947. It appears, however, that he was paid only $4,000.00 per house, as provided in his agreement with Mutual and not $5,100.00 per house as provided in his agreement with Biltmore. Attached to the Mutual agreement in evidence is a schedule of payments made to Faust entitled "Receipts by and for Account of Simon Faust of Proceeds of Note and Mortgage to Mutual Savings and Loan Company". The schedule lists payments in varying amounts from April 1 to October 24, 1947, in the aggregate sum of $359,966.81, that is, approximately $360,000.00 for ninety houses. The schedule also shows that all of the moneys were paid

* Only ninety houses were built so that the total amount paid to Faust for the construction of the houses was $360,000.00.

by (or through) one or the other of the three brothers, most of them by James and Frank, a few by Charles.

All of the houses and lots were sold to veterans in 1947 for a total of $542,051.00. The veterans assumed the first mortgages given by Biltmore to Perpetual in the sum of $472,900.00 and gave second mortgages in the sum of $68,713.50 and paid $437.50 cash for each house. The first mortgages were insured by FHA. They were sold by Perpetual for their face value between September 3, 1947 and April 28, 1948. The second mortgages were credited by Perpetual to Biltmore in the sum of $33,838.45, which Biltmore agreed was their reasonable value.

Biltmore reported no net income in its income tax return for 1947 and reported $347.33 for 1948. The Commissioner determined deficiences for these years in the amount of $101,788.01 and $5,429.08, respectively. The Tax Court, finding increases in the cost of the lots, reduced these figures to $98,453.75 in 1947 and $468.59 in 1948.

The Commissioner also determined that in 1947 and 1948 Biltmore's income was diverted to other corporations (Mutual and Perpetual) in the amount of $90,813.34 and $10,355.59, respectively, for the benefit of Biltmore's three stockholders and charged each of them with one-third of these amounts as dividends. The Tax Court redetermined these dividends in slightly less amounts.

The correctness of the determinations of the Commissioner and the Tax Court as to the tax liabilities of Biltmore and of the three brothers in these respects depends upon the cost incurred in erecting the houses. Biltmore deducted $5,100.00 per house, or a total of $459,000.00 as the cost of the ninety houses. The Commissioner determined that the total cost was only $4,000.00 per house, or $360,000.00 in all. Under the established rules the determination of a deficiency by the Commissioner is presumptively correct and the determination of factual issues by the Tax Court must be sustained by a reviewing court unless it is clearly erroneous. *Heiverinq v. National Grocery Co.*, 304 U. S. 282. In the instant cases the weight of the evidence with respect to the cost of the houses shows that the determination was correct. Obviously the three brothers

embarked upon the housing project to earn a profit for themselves and were desirous of cutting the construction costs to a minimum; and it is an entirely reasonable inference that they knew from the beginning that Faust was willing to undertake the operation for $4,000.00 per house and that the sum of $5,100.00 set out in the original agreement between Biltmore and Faust was entirely fictional. The probative force of the chronology of events is overwhelming. On March 15, Faust agrees with Biltmore to build the houses for $5,100.00 per house and Biltmore agrees to secure the payment by giving a mortgage, but only upon the condition that Faust is not to be paid any money until the houses are finished. On April 1, Faust agrees with Mutual to build the same houses for $4,000.00 per house and Mutual agrees to furnish the necessary money in consideration of the execution of a mortgage by Faust upon the houses which Faust does not own and upon building supplies belonging to him on the Biltmore properties or elsewhere. Mutual got no title to the real estate or to the houses upon completion. Its only interest on the face of the agreement was to lend the money at 6 per cent interest, and the cost of the houses was material only to fix the maximum amount of the loan at $376,000.00. Under the agreement Mutual was to receive no other money in the transaction than the repayment of the loan with interest.

It is significant, as indicating that all of the agreements in the series were parts of a single transaction, that Biltmore did not execute its mortgage to Perpetual until April 10, after Faust had made the agreement with Mutual. The fact that the brothers controlled the operations of all three corporations involved emphasizes the absurdity of two prices by the same builder for the same work. The only reasonable explanation is that by a complicated course of transactions they hoped to make it appear that one or the other or both of the tax exempt corporation received the profit so that it might escape taxation altogether. Under these circumstances the tax authorities were justified in concluding that the profits found their way into the pockets of the promoters and were diverted for their benefit to other projects in which they were interested.

The taxpayers do not offer any reasonable explanation. Their defense consists in part of incredible testimony and in part of deliberate suppression and concealment of the facts. Only one of the brothers testified while the others remained discreetly silent. Faust was dead at the time of the hearing, but that is of little importance in this connection, for it is admitted that he only received $360,000.00 for building ninety houses. The question is: Who got the profit of $99,000.00?

Frank, the president of Biltmore, testified that Biltmore did not get it. He said that so far as he knew the $5,100.00 per house was paid to the contractor or to the construction lender. The first statement cannot be accepted for it is contrary to an express admission in the brief filed for him and his brothers in this case. The second statement cannot be accepted for it is inconsistent with the agreement between Faust and Mutual under which Mutual was to be paid only the moneys which it advanced to Faust. At another point in his testimony, when asked how he knew that Biltmore ever paid $5,100.00 per house at any time for any purpose, Frank replied: "I am pretty sure that Perpetual Building and Loan paid it to Faust or Mutual Savings and Loan. I did not have any direct knowledge of it, but I am pretty sure of that being the case". Upon this evidence alone the taxpayers now make the flat contention that Mutual, a tax exempt corporation, received the difference between $4,000.00 and $5,100.00 per house, or a total of $99,000.00 for advancing the money to Faust during the construction.

The Tax Court rejected this testimony as incredible. We are of the opinion that its conclusion was amply justified not only because of the palpable inadequacy of the evidence on the taxpayer's behalf but because of the deliberate suppression of testimony easily available to them. There can be no doubt whatever that James and Charles knew what became of the $5,100.00 per house and what became of the $99,000.00 profit in the transaction; but neither of them testified. James was the president of Mutual and could have testified with certainty whether Mutual received the money; but James was silent. Charles was the president and op-

erator of Perpetual which sold the first mortgages for their face value and received the money, which included the profit of $99,000.00. He must know to a certainty what Perpetual did with the money and what corporation or individual received the profit in the transaction, yet Charles remains silent as a witness. He appears only as a lawyer for himself and his brothers in this case and contents himself with specious argument rather than disclosure of the true facts. This conduct on the part of a member of the bar and an officer of this court needs no characterization from us. It speaks for itself. The conclusion that Biltmore, the corporation, owned by the three brothers received the profit from the building operations must be approved.

The additional determination that the three brothers themselves received taxable income from Biltmore in 1947 and 1948 is likewise supported by the evidence set out above. It is of no importance that the income did not pass through their hands, if such be the fact, for if it was diverted at their behest into the hands of others, it was nevertheless taxable to them. As was said in *Clark v. Commissioner*, 9 Cir., 226 F. (2d) 698, 711:

"To constitute a distribution taxable as a dividend, the benefit received by the shareholder need not be considered as a dividend either by the corporation or its shareholders, declared by the board of directors, nor other formalities of a dividend declaration need be observed, if on all the evidence there is a distribution of available earnings or profits under a claim of right or without any expectation of repayment."

It is established that Biltmore executed mortgages to Perpetual in the sum of $472,000.00 on April 10, 1947, and that Perpetual sold the mortgages for the face value and received the money. It did not advance any money to the builder during construction. How then did it dispose of the proceeds? Charles of Perpetual knows the answer but he does not speak and we can only conclude that if it was not paid to Biltmore, to whom it belonged, it was diverted into other channels for the benefit of Biltmore's stockholders. This must have been the case, since the evidence shows that the stockholders of Biltmore received no part

of the profit on the building transaction when Biltmore was liquidated on December 31, 1948.

Two additional questions, one relating to moneys received by Charles Cooper from the Cooper Motor Lines, Inc. in 1947 and 1948, and one relating to the proceeds of a sale of residential property received by Frank Cooper in 1951, remain to be considered. Cooper Motor Express, Inc. a South Carolina corporation, was organized to conduct an interstate motor transportation business. It had 300 shares of capital stock with a par value of $10.00 per share which was owned in equal portions by six members of the Cooper family, including the three brothers in this case. On March 5, 1942 its operating assets, together with certain liabilities, were transferred to Cooper Motor Lines, Inc., a new corporation, under a contract which provided that a certain percentage of the gross receipts of the Motor Lines should be paid to Motor Express its successors and assigns. After the transfer Motor Express had assets of $100,396.05 in addition to the contract with Motor Lines, and liabilities (including $3,000.00 of capital stock) of $153,905.87, or a deficit of $53,509.82.

On January 1, 1943, Charles Cooper acquired all the assets of Motor Express, including its contract with Motor Lines, and assumed all the liabilities of Motor Express. According to a stipulation Charles received the assets of Motor Express, including the contract with Motor Lines, in return for assuming the liabilities of Motor Express. This stipulation does not allocate the purchase price amongst the assets of Motor Express so as to show the cost to Charles of the several items of assets, including the Motor Lines contract.

On November 1, 1945, Charles and the Motor Lines, by contract, changed the amount of the payments to be made by Motor Lines under the contract which Charles had acquired. Thereafter Charles received the following payments from Motor Lines:

1945 -$20,000.00	1947—$ 6,000.00
1946— 13,333.33	1948— 19,194.00

In his return for 1947, Charles reported the receipt of $6,000.00 from this source but claimed that it represented

a partial return of the cost of acquiring the motor contract. In 1948, he deducted $398.77 as part of the cost of the contract and reported 50 per cent of the balance of $19,541.23 as a long-term capital gain. He now says that the correct balance should have been $5,763.51 since $14,176.49 of the amount received in 1948 represented the final recovery of the cost of the motor contract. He concedes, however, that the amount received was ordinary income. The Commissioner determined that Charles had recovered the cost in prior years and that the amount received in 1947 and 1948 were ordinary income. The Tax Court upheld the determination of the Commissioner on the ground that the taxpayer had not shown what portion of the cost incurred in acquiring the assets and the Motor Lines contract from Motor Express should be allocated to the contract, and had not shown that an allocation was impracticable. We are in accord with this conclusion. It has long been established that when a mixture of assets is acquired at one time the total purchase price must be allocated, if practicable, among the assets so as to determine the profit earned in subsequent sales of specific items. 3A Mertens, Law of Federal Income Taxation, §21.32. Since the taxpayer has offered no evidence on this point and has not met this test, he has failed to show that the Commissioner's determination was erroneous. *Burnett v. Houston*, 283 U. S. 223. A taxpayer cannot establish error in the determination of the Commissioner when he fails to present evidence to establish a definite cost basis.

The question as to the taxability of the gain derived by Frank Cooper from the sale of residential property calls for an application of §112(n)(1), Internal Revenue Code, 1939. This provides that if property used by a taxpayer as his principal residence is sold and within a period beginning one year prior to the sale and ending one year thereafter other property is purchased and used by the taxpayer as his principal residence, the gain from the sale of the old property shall be recognized only to the extent that the taxpayer's selling price of the old exceeded the purchase price of the new property. Frank Cooper, in 1946, bought the property at 319 North Trenholm Street, Co-

lumbia, South Carolina, where he resided with his parents. He was married in September 1949 and left this residence and moved with his wife to a rented house, where he lived until November 10, 1951. He then moved into a house on Country Club Drive, Columbia, South Carolina, which he had bought at a cost in excess of $30,000.00. On November 12, 1951, he sold the Trenhoim Street property to his mother for $30,000.00. She had continued to live in the house after Frank and his wife were married in 1949.

Frank had paid $10,400.00 for the Trenholm Street property so that he made a profit of $19,600.00 when he sold it to his mother. He claims, however, that under the provisions of the statute the gain should not be recognized. His theory is that the Trenholm Street house continued to be his principal residence until 1951, when he moved into his new house on Country Club Drive. The Commissioner rejected this contention and increased his net income by 50 per cent of the gain of $19,600.00 and the Tax Court affirmed this determination. This decision was correct. Regulation 111, §29-112(n)(1), 1939 Code, provides that whether or not a property is used by the taxpayer as his principal residence depends upon all the facts and circumstances of the particular case. The facts in this case strongly support the conclusion that after the taxpayer was married and moved into another house the property at 319 North Trenholm Street ceased to be his residence and thereafter his residence was the property occupied by himself and his wife.

Affirmed.

APPENDIX "B"

Internal Revenue Code of 1939:

Sec. 22. GROSS INCOME.

(a) General Definition.—"Gross Income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transactions of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. (26 U.S.C. 1952 ed., Sec. 22.)

Sec. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) (as amended by Sec. 166, Revenue Act of 1942, *supra*) Definition of Dividend. The term "dividend" when used in this chapter (except in section 201(c) (5), section 204 (c) (11) and section 207 (a)(2) and (b)(3) (where the reference is to dividends of insurance companies paid to policy holders)) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings of profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made. (26 U.S.C. 1952 ed. Sec. 115.)

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SUPREME COURT, U. S.

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No. 175

In the Supreme Court of the United States

OCTOBER TERM, 1961

BILTMORE HOMES, INC., AND FRANK B. COOPER, CHARLES F. COOPER, JAMES D. COOPER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 175

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The sole issue involved concerns the amount of income realized by Biltmore Homes, Inc., and by its three shareholders, officers and directors, Frank, Charles and James Cooper, on the sale of 90 houses in 1947. The answer to this question depends upon a resolution of an alleged $99,000 difference between the computations of the Commissioner and the taxpayers with respect to the cost of constructing the houses.[1]

The Commissioner had determined that the cost of construction did not exceed $360,000, or $4,000 per

[1] The taxpayers do not question the Commissioner's determination and the findings of the courts below as to the amount realized from the sale of the houses (see Pet. 3–4).

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house (see Pet. App. 11). The three brothers, having conceived of a plan by which Biltmore Homes, Inc., Perpetual Building and Loan Association of Columbia, and Mutual Savings and Loan Association, three corporations which were controlled by the brothers, would enter into a complex series of transactions, argued that, as a result of these transactions, they had no net income in 1947. They contend that Biltmore was obligated to pay the contractor $459,000, or $5,100 per house, for construction costs, and that either Biltmore, Perpetual or Mutual reimbursed the contractor to the extent of $459,000. Alternatively they contend that, if the contractor had been reimbursed only $360,000, then either Perpetual or Mutual retained the $99,000 balance of the proceeds, so that neither Biltmore nor the Coopers ever received this amount (see Pet. App. 13).[2]

[2] The court of appeals properly pointed out (Pet App. 12) that the only reasonable explanation for the complex transactions was that the brothers hoped to make it appear that one or the other or both of their tax-exempt corporations (Perpetual and Mutual) received the profit so that the brothers could escape taxation altogether. In 1952, the Commissioner retroactively revoked Perpetual's tax exempt status as of 1945. See *Perpetual Building and Loan Association of Columbia* v. *Commissioner*, 34 T.C. 694, 709–715, affirmed *per curiam sub nom. Estate of Cooper* v. *Commissioner*, 8 A.F.T.R. 2d 5045 (C.A. 4th, June 19, 1961). The revocation was upheld because, *inter alia*, Perpetual had frequently been used to finance the Coopers' real estate transactions, including the transaction involved here, and because, at various times during 1946–1949, the Cooper family had received from Perpetual dividend credits to their accounts amounting to 200 to 600 percent of their original investments, whereas other shareholders had received no more than 4 percent annually.

Upon careful analysis of the evidence adduced at the trial, both courts below completely rejected the taxpayers' contentions and upheld the Commissioner's determination, observing that neither Biltmore nor anyone acting on its behalf paid the contractor more than $360,000 to construct the houses, and that the $99,000 of profits found their way into the pockets of the Cooper brothers.

This Court will not review concurrent findings of fact in the absence of exceptional error. *Comstock* v. *Group of Investors*, 335 U.S. 211, 214; *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, 51. Since the taxpayers have failed to demonstrate that error has been committed, and since the question involved is limited to the facts of this case and is not of general importance, there is no warrant for review by this Court.

Respectfully submitted,

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